Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the Omaha	)	
Metropolitan Statistical Area	)	

OPPOSITION OF MCI, INC.

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MCI, Inc. ("MCI") submits its comments in opposition to the Qwest Corporation's ("Qwest") Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area ("Petition").

I. INTRODUCTION AND SUMMARY

MCI opposes Qwest's petition for forbearance from dominant carrier and local competition regulation in the Omaha, Nebraska, MSA. While MCI agrees with Qwest's most general policy premise – that a finding of nondominance, or forbearance under section 10, would be warranted if Qwest could demonstrate robust facilities-based competition – Qwest's petition should be denied because it is all wind-up and no pitch. The petition describes the conditions that ought to apply before forbearance is granted, but then fails to establish that these conditions are present in the Omaha MSA. In particular, Qwest's petition fails to take into account long-established Commission precedent that dominant carrier regulation remains necessary unless there are least two full- fledged facilities-based competitors offering fully substitutable services, along with other carriers offering less robust competitive services. Those conditions are not present in the Omaha MSA.

As MCI describes in detail in what follows, Qwest's petition must be denied for the following reasons.

Market Definition. Before any competitive analysis can be undertaken, the market has to be adequately defined. In telecommunications services, markets can often be differentiated by geographic area, by the services offered, and by the type of customer. A residential customer in downtown Omaha purchasing plain old telephone service may have competitive choices that are unavailable to a business in the Iowa suburbs purchasing T1 special access services. And, the competitive characteristics of the market for terminating switched access services in Omaha are entirely different than the characteristics of the market for dedicated access services. Yet Qwest treats all customers seeking all kinds of telephone services anywhere within the Omaha MSA as being in the same market, and seeks broad forbearance without regard to customer, service or geographic location within the MSA. Consequently, Qwest does not take even the first step towards satisfying its burden of proving that there are competitive choices in all of the situations for which it seeks forbearance and non-dominance

Substitutable Services. Qwest acknowledges that the competitive services upon which it relies must offer "virtually indistinguishable service offerings to Qwest's telecommunications offerings at comparable prices."[1] It then goes on to rely, however, upon wireless and IP-based telephony services that the Commission has already held do not meet this standard.

Competition That Will Survive Requested Deregulation. Qwest cannot justify deregulation by relying on the very competitive services that could be eliminated if its request for deregulation is granted. Qwest, like the other ILECs, is obsessed with the platform of unbundled network elements ("UNE-P"), and files this petition in part to obtain forbearance from

[1] Petition at 15.

the section 251(c) regulations that make UNE-P possible. Qwest is entitled to its obsessions, but it may not rely on UNE-P (or UNE-Loop) competition as a basis for seeking forbearance from the requirements of section 251(c) so that it is no longer required to permit these forms of competition in the MSA.

Record Facts. Stripped of the legally irrelevant UNE competition, and the only marginally relevant competition from wireless and VoIP providers, what Qwest's petition establishes is that in some parts of the Omaha MSA for residential customers purchasing exchange services there is some competition from Cox cable. Leaving aside whether this limited competition is "virtually indistinguishable" or offered at "comparable competitive prices," Qwest is one competitor short. A duopoly in the residential retail market leaves Qwest with market power that continues to require regulation.

Furthermore, (1) Qwest does not establish even that much competition exists in the small and enterprise business markets; (2) Qwest does not even address the wholesale market, much less establish that there is a functioning wholesale market; (3) Qwest fails to provide any evidence of competition in the special access market; and (4) Qwest fails to provide any evidence of competition in the market for switched access, or recognize the unique characteristics of the market for switched access.

This is the first ILEC forbearance petition to seek such broad-based relief from Commission regulation of both wholesale and retail services. It is therefore of paramount importance to incumbents and competitors alike that the Commission get this one right, and explain precisely the conditions that should be present before such a petition will be granted. On any conceivable understanding of those conditions, this petition falls well short of the mark, and for that reason should be denied.

II. QWEST'S PETITION SHOULD BE DENIED

A. Qwest Has Failed to Meet The Standard for Establishing Non-Dominance and Forbearance Under Section 10

Qwest seeks non-dominant status, and also seeks forbearance from regulation under 251(c) and 271, in the Omaha Nebraska MSA for all of its telecommunications services. A non-dominant carrier is "one that does not possess market power."[2] Forbearance from the requirements of sections 251(c) and 271[3] in turn requires satisfaction of the statutory criteria set out in sections 10(a) and 10(d) of the Act.[4] The requirements of section 10(a) specify that forbearance is appropriate only when the regulation at issue is not necessary to ensure that the relevant carrier practices are just and reasonable, when regulation is not necessary to protect consumers, and when forbearance is otherwise in the public interest. The Commission in particular is instructed to consider whether forbearance "will promote competitive market conditions."[5] Section 10(d) mandates that the requirements of sections 251(c) and 271 have been fully implemented before they may be lifted.

To support both its claims of nondominance and forbearance, Qwest must do the following: (1) properly define the market; (2) properly define "market power;" and (3) carry its burden of providing facts sufficient to support its claims that it lacks market power in the relevant market. As we demonstrate, Qwest fails to do each of these things in its Petition.

Qwest also fails to prove that it has satisfied the requirements of section 10(d). That provision requires Qwest to prove not only that regulation is no longer necessary to ensure that Qwest's practices that relate to the interconnection and access requirements set out in sections

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[2] *In the Matter of Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 F.C.C.R. 3271 (1995) ("*AT&T Non-Dominance Order*"), ¶ 19.

[3] 47 U.S.C. §§ 251(c), 271.

[4] 47 U.S.C. § 10(a)(d).

[5] 47 U.S.C. § 10(b).

251(c) and 271 are "just and reasonable." Congress required that Qwest prove more: that it has "fully implemented" each of these requirements. Congress evidently meant to impose a higher burden on the BOC than establishing mere "just and reasonable" practices, as it made clear that section 10(d) is to act as a "limitation" on the more relaxed requirements of section 10(a). At the very least, then, a successful petitioner for relief under section 10(d) would have to make a concrete showing as to each of the provisions of sections 251(c) and 271 that it has "fully implemented" these statutory obligations. Remarkably, as we show in what follows, Qwest does not even attempt to make such a showing in its Petition, and this by itself is reason enough to deny its request for forbearance.

B. Qwest Has Failed to Define the Relevant Markets

The starting point of any market power analysis is the identification of the relevant market. For the purposes of this proceeding, MCI accepts Qwest's approach to defining the relevant geographic market -- Qwest asserts the Omaha MSA is an appropriate geographic market, while acknowledging that smaller or larger geographic areas might also be appropriate depending upon empirical facts.[6] It explains that because "the competitive characteristics of the Omaha MSA are readily identifiable and are not necessarily similar to the competitive characteristics of other areas in the state," it is sensible for the Commission to consider this MSA as a geographic market.[7] Key among the competitive characteristics upon which it relies is supply and demand substitutability in the Omaha MSA, and we agree that these are useful ways to analyze whether the geographic area proposed constitutes a "market."[8] Based upon Qwest's

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[6] Comments at 7 & n.21.
[7] *Id.*
[8] *See AT&T Non-Dominance Order* ¶ 23 (describing importance of supply and demand substitutability for market determination).

evidence, for the most part MCI does not dispute that the Omaha MSA describes a relevant geographic market.[9]

Where Qwest's Petition fails is in its refusal to consider different customer and product markets. Qwest assumes, but not does defend, the proposition that the appropriate market is all of the telecommunications products that it sells to any customer -- mass markets or enterprise; access or exchange; wholesale and retail. That assumption is wrong, and this error infects every part of its Petition. In particular, Qwest is seeking relief for all services but presents evidence that is largely relevant only to residential local exchange services. Notably, Qwest fails to present any evidence concerning the level of competition for special access services or for switched access services – the services for which it is regulated as a dominant carrier by the Commission. Similarly, Qwest fails to present any evidence concerning the level of competition for wholesale services – the services that Qwest is required to provide pursuant to section 251 and section 271 of the Act.

C. Qwest Has Failed to Provide Evidence to Assess Market Power

If Qwest had adequately defined the relevant markets, it next would have had to adequately explain what standard should apply for assessing whether it has market power within each of those markets. MCI agrees with Qwest that the type of analysis that the Commission conducted in the AT&T nondominance proceedings – looking at market participants, market share, supply elasticity, demand elasticity and other factors – provides a sound basis for evaluating Qwest's market power under both the Commission's dominant carrier standard and the Act's section 10 standard.

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[9] The one market in which it makes no sense to consider the Omaha MSA as the geographic market is the market for terminating switched access services. In that market, focus on the Omaha MSA alone would be completely irrational. *See infra.*

As discussed above, however, Qwest has completely failed to provide any of the necessary evidence to evaluate competitive conditions in the switched and special access markets, or the wholesale market, in the Omaha MSA using the analytical approach employed by the Commission in the AT&T nondominance proceeding. And even for those markets where Qwest has provided some supporting data with its Petition, Qwest's pleading falls well short of demonstrating the level of competition that the Commission found when it declared AT&T nondominant.

Identification of Market Participants: In determining whether the market is competitive, the Commission needs to determine participants in the market. MCI generally agrees with Qwest that the test is whether the alternatives in question are "virtually indistinguishable service offerings to Qwest's telecommunications offerings at comparable, competitive prices."[10] However, MCI does not agree with Qwest that wireless or VoIP services meet this standard.

First, Qwest points to the relationship between the growth of wireless service in Nebraska in 2003, and a much smaller drop in wireline usage as "proof" that the two services are substitutable.[11] But it provides no data from the Omaha MSA, and, equally to the point, through this data Qwest does not establish that wireless service is an "indistinguishable service offering" to wireline service. For all it appears, the drop in wireline service may have more to do with loss of second line business due to the growth in broadband Internet access service as with the growth of wireless service. And even if there is some relationship between the drop in wireline services and the rise in wireless services, "some relationship" simply is not the same thing as proof that one service is fully substitutable for the other.

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10 Petition at 15.
11 *Id*. at 9.

Indeed, the principal statistic upon which Qwest relies -- that only about 10% of wireline telephone users nationwide would consider substituting wireless service for their landline phone,[12] would seem to prove in the most emphatic way that for the overwhelming majority of people, wireless telephony is not a substitute.

That statistic merely corroborates what is common knowledge. Wireless phones provide an inferior quality of service that many consumers are willing to accept as a trade-off for mobility, but that most consumers do not accept as a substitute for the landline phone. Indeed, in many homes there is no wireless reception at all. Qwest provides no data on the extent of wireless coverage in the Omaha MSA, and so fails to establish that substitution is even possible within the MSA. Finally, wireless substitution is not at all a factor in the enterprise marketplace, or the marketplace for dedicated access services.

That is not to dispute that a very small but growing number of residential consumers are substituting wireless service for landline service, or that this phenomenon is important to the economics of the telephone industry. They are and it is. And this niche use has some small effect on Qwest's market power in the market for residential exchange, exchange access and interexchange services. That is because for a small set of consumers in these markets (which Qwest inadequately identifies as around 10% of the consumers nationwide), Qwest's ability to price is directly constrained. Moreover, there is a somewhat larger subset of consumers who would presumably at some point switch to wireless service if Qwest raised its prices sufficiently high. But this identifies at most a niche market. As the Commission recently held in its *Triennial Review Order*, CMRS remains "primarily a complementary technology to wireline

[12] Petition at 11.

narrowband service"[13] because "CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity."[14] In sum, as Commission precedent establishes, CMRS providers cannot be counted as a participant in the market for exchange or exchange access services.

VoIP Services. Qwest also relies, to an unexplained degree, on the growth of nascent VoIP services. To begin, as with its discussion of wireless services, Qwest provides no data on how widespread this phenomenon is within the Omaha MSA. And, as with wireless services, Qwest's evidence, such as it is, concerns almost exclusively the residential marketplace. VoIP would appear to have no relevance to the access marketplace, and Qwest provides no information about its use in the enterprise marketplace.

While VoIP services hold great potential, they have gained only limited market share. Additionally, because the IP-based voice services market is in its infancy, little is known about whether it will be offered at rates comparable to PSTN telephony. Typically, IP-based voice services require consumers to purchase a broadband service from either their telephone company or their cable company, a significant investment that most households have thus far refused to make. Most VoIP providers then charge an additional fee (or range of fees) to obtain voice services over the broadband connection. Whether this package of broadband and IP-based voice services ultimately will be priced competitively with traditional voice services remains to be seen. Right now it is not.

Non-Facilities-Based Competitors. Finally, Qwest relies on competitors that rely to a greater or lesser degree on Qwest's own facilities to provide their services. That is the case for competition using UNE-P facilities leased from Qwest, and, to a lesser degree, competition using

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13 *Triennial Review Order* ¶ 230.
14 *Id.*

UNE-L loop facilities. These competitors should not be counted in the Commission's market power analysis because, as discussed above, their service offerings exist solely either as a result of wholesale regulation that Qwest wishes to be free of, or because Qwest feels it is in its interest to provide the wholesale services upon which the retail services depend. Thus, if Qwest successfully obtains forbearance, it will have no further obligation to provide unbundled local switching and it will no longer have to permit UNE-P competition unless it believes it to be in its interest to do so. Nor would Qwest have any further obligation to provide unbundled local loops to facilitate UNE-L competition.

Qwest's self-interest in providing wholesale services is almost entirely a function of its market power. If it retains market power in the retail market, it would have no interest in competition that would threaten that market power. It would in that situation not likely make unbundled local switching available voluntarily on a wholesale basis. That, of course, is the very market failure that led Congress and the FCC to enact regulation to require Qwest to make switching available in the first instance. Only if Qwest is operating in a retail market that would be competitive even in the absence of UNE-P competition would Qwest's self-interest lead it to make its switching facilities available to competitors on a wholesale basis. In that situation, Qwest would presumably welcome the wholesale revenues that UNE-P brings, as opposed to losing the business altogether.

In addition, Qwest argues that cable competition alone has eliminated its market power and will lead it to continue to provide wholesale services even in the absence of regulation. MCI believes that this claim is frivolous – it ignores the uniformly held view of economists and the Commission itself, as well as ample practical experience, that duopoly markets are not competitive. The Commission has already thoroughly addresses that issue. MCI's points here is that UNE-P competition cannot be counted as contributing to the competitive marketplace that would survive a Commission decision to deregulate that marketplace. Because UNE-P and other non-facilities-based retail competition will survive deregulation only to the extent that the market will be competitive even in their absence, they cannot be counted when assessing the extent to which the marketplace will remain competitive if it is deregulated.

III. QWEST REMAINS DOMINANT IN THE OMAHA MARKET

With these principles in mind, MCI now turns to Qwest's claim that it is nondominant and should be subject to forbearance in all telecommunications markets in the Omaha MSA.

A. The Market for Residential Telephone Exchange Services is not Competitive

In the AT&T nondominance proceedings, the Commission was able to declare AT&T nondominant only after it found the presence of two full-fledged facilities-based competitors to AT&T, in addition to a large number of smaller players.[15] Qwest has clearly failed to meet that standard.

Key to Qwest's pleading is the claim that there are numerous participants in the Omaha MSA, and that supply in the Omaha MSA is sufficiently elastic to constrain Qwest's pricing. This claim is without merit. At most, Qwest's petition shows that it faces a single facilities-based competitor offering a substitutable residential telephone exchange service – Cox Cable – and even that provider competes with Qwest only in portions of the Omaha MSA. As discussed above, most of the other competitors that Qwest points to in its petition are wireless or VoIP providers that do not offer fully substitutable services, or are competitors that rely at least in part on the very unbundling rules from which Qwest is seeking relief.

[15] *See, e.g., In the Matter of Competition in the Interexchange Marketplace,* 6 F.C.C.R. 5880 (1991).

These facts describe a duopoly market in which Qwest still maintains substantial market power. The Commission has consistently embraced the uniformly held view among economists that duopoly markets are insufficiently competitive because of the ever-present risk of tacit collusion: that the duopolists will recognize their shared economic interest with respect to price and output decisions and will act, albeit implicitly, so as to achieve supracompetitive profits.[16] For example, in reviewing proposed mergers among satellite television providers, the Commission recognized that a merger resulting in "duopoly," that is, "near-monopoly," "create[s] a strong presumption of significant anticompetitive effects."[17] The Commission reached similar conclusions about duopoly in the area of spectrum caps, stressing that a "duopoly cellular market" was "imperfectly competitive."[18]

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[16] *See* Xavier Vives, *Oligopoly Pricing, Old Ideas and New Tools* at 6 (1999) (explaining tacit collusion theory); Edward Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value* 46-55 (8th ed. 1962) (explaining that in a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger). Also known as "spontaneous coordination," or "conscious parallelism," the concept of tacit collusion means that duopolists do not need to expressly collude in order to act so as to jointly attain supracompetitive profits. Rather, they have incentives to act interdependently. Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory,* Antitrust Law Journal 719, 726, 764 (2004) (internal citations omitted). Indeed, "from an economic point of view, explicit and tacit collusion are not fundamentally different," that is, they present the same problem of anti-competitive effects. Louis Philips, *Competition Policy: A Game Theoretic Perspective* 94 (1996).

[17] *In the Matter of Application of EchoStar Communications Corporation, Hearing Designation Order*, 17 F.C.C.R. 20559, 20604-05, ¶¶ 99, 102 (2002) (hereinafter "*In the Matter of Echostar*").

[18] *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report & Order*, 11 F.C.C.R. 18455, 18470, ¶ 27 *(1996); see also In the Matter of Petitions for RuleMaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, Notice of Proposed Rulemaking & Order*, 6 F.C.C.R. 1719, 1725, n. 67 (1991) ("We note at the outset that with respect to the current cellular market structure, the duopoly market structure was established in full recognition of the fact that only two carriers to a market was not ideal in terms of promoting competition."). Relatedly, the Commission has recognized that it is where a market has significantly more than two firms that competitive conditions may result. *See In the Matter of 2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the*

The Commission's repeatedly expressed concerns about the dangers of duopoly are well grounded in economic theory. While a number of economic models of oligopolistic behaviors (of which duopoly is, of course, the most extreme example) exist, they coincide in teaching that anti-competitive outcomes increase as the number of firms in a market decreases, particularly in a duopoly situation.[19] This is because of the interdependence between firms built into duopoly: each firm realizes that its "own move has a considerable effect upon [its] competitors, and that this makes it idle to suppose that they will accept without retaliation the losses [it] forces upon them."[20] Price cuts by one firm, for example, can be expected to directly inflict losses on the only other firm in the market, by taking away customers from that firm, creating incentives for both firms to keep prices high.[21] The same is true for increases in production: an increase by one duopoly firm will directly and negatively impact the profits of the other, creating incentives to jointly keep output below what it would be at competitive levels.[22] With only two firms in the

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Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.C. 13620, 13731, ¶ 289 (2002) ("[B]oth economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.").

[19] *See, e.g.*, Vives, *Oligopoly Pricing* 301-322 (examining various game theory models of collusive behavior by duopolists and observing that both game theory and the empirical literature show that collusion breaks down as the number of firms involved increases); R. Selten, *A Simple Model of Imperfect Competition, where 4 are Few and 6 Are Many*, Int'l J. of Game Theory 141, 141 (1973) (explaining through game theory modeling that "a small group" of suppliers will "maximize [its] joint profits," and that in this context a "small group" is one containing four or fewer firms).

[20] Jean Tirole, *The Theory of Industrial Organization* 240 (9th ed. 1997) (quoting Edward Chamberlin, *The Theory of Monopolistic Competition* (1933) (internal quotation marks omitted)).

[21] *See id.*

[22] *See* R. Blair & D. Kaserman, *Antitrust Economics* 193-200 (1985) (explaining, under Cournot, Stackelberg, and Chamberlian duopoly models, that duopolistic firms will tend to coordinate output to produce, collectively, less than the competitive level of output for the given market, and that a background assumption is that deviations from such behavior may be punished by the other firm increasing output); *see also* T. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth*, 14 Harv. J.L. & Tech. 335, 517 (observing that incumbent cell-phone providers responded

market, Qwest and Cox, for example, they will be able to observe and react to each other's behavior with relative ease, providing them with classic duopolist incentives to act so as to maximize joint profits, to the great detriment of competition in the local telephone market.[23]

The courts have echoed the types of concerns expressed by the Commission, and founded in economic theory. For example, as the Court of Appeals for the District of Columbia explained, "a durable duopoly affords both the opportunity and the incentive for both firms to coordinate to increase prices" "above competitive levels."[24]

Moreover, even beyond the serious anti-competitive effects of duopoly in itself, factors known to increase the probability of duopolistic collusion are present here.[25] Those factors include, most significantly, the high barriers to entry in the residential voice services market, the relatively homogeneous telecommunications products as between Qwest and Cox, and demand inelasticity for local telephony service.[26]

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to the advent of PCS "by dramatically increasing their subscribership. Rates have not fallen due to decreased pressure to access cellular systems; those bands are used more intensively than ever. New cellular capacity has been 'found' via investments adding cell sites and base stations.").

[23] *See* J. Tirole, *Theory of Industrial Organization* 240-247 (explaining that numerous economic theorists have concluded that through interaction in the market, oligopolistic firms observe each others' conduct and learn that efforts to undermine supracompetitive pricing or output decisions may result in retaliation, giving incentives to collude tacitly); L. Philips, *Price Competition* 82 (noting that even under "imperfect information" about each other's pricing and output decisions, "[i]n . .. duopoly markets, significant," if "less than perfect . . . cooperation occurs, but, with an increase in the number of firms, it vanishes almost completely").

[24] *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 380-81 (D.C. Cir. 2001); *see also FTC v. Swedish Match*, 131 F. Supp.2d 151 (D.D.C. 2000) (enjoining proposed merger of first and third largest producers of loose-leaf tobacco) (cited in *In the Matter of Echostar*, 17 F.C.C.R. 20559, 20667 n.308).

[25] Again, as used herein, "collusion" does not imply express agreement but, rather, the range of interdependent decisions by duopolistic firms that lead to anti-competitive effects.

[26] *See In the Matter of Echostar*, 17 F.C.C.R. 20559, 20625 ¶ 174 (explaining that factors which increase the possibility of collusion include, *inter alia*, high barriers to entry and products that are relatively homogeneous); R. Posner, *Antitrust Law* 69-79 (2d ed. 2001) (identifying high seller concentration, no fringe of small sellers, inelastic demand at competitive price, long entry time, many customers, homogeneous product, principal firms selling at the same level of

High barriers to entry are important for the obvious reason that they shelter the duopolistic firms from the threat of new entrant competition even if those firms engage in tacitly collusive, anti-competitive behavior. Entry barriers for the local telephony market in the form of "significant fixed and sunk costs" and economies of scale problems for potential new entrants are well-known and daunting. Indeed, they form the basis for requiring the very UNE-based competition which Qwest now seeks to avoid.[27] This situation typifies the observation that "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination."[28]

Homogeneity as to the product offered facilitates coordination by duopolistic firms as to pricing, including at supracompetitive rates.[29] While there may be some differences in the services offered by Qwest and Cox, they each offer similar services. This makes it more likely that they will act interdependently and in such a manner that supracompetitive pricing obtains.

Qwest is dominant in this market, and Qwest satisfies none of the standards for forbearance from the requirements of sections 251(c) and 271. If Qwest were given the relief it requests, it would have every incentive to eliminate the wholesale competition it is the purpose of section 251(c) and 271 to create and preserve. And, Qwest would equally have the incentive and ability to raise rates above a market level.

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distribution, relative importance of price competition, high ratio of fixed-to-variable costs, static or declining demand, sealed bidding, and past anticompetitive behavior as conditions favorable to collusion).

[27] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696, 16 F.C.C.R. 1724, ¶¶ 13, 79-80, 84 (1999).

[28] *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 380-81 (D.C. Cir. 2001) (internal quotation marks and citations omitted).

[29] *See* Jean Tirole, *The Theory of Industrial Organization* 242 (9th ed. 1997) (explaining that "heterogeneity in costs and products may make coordination on a given price difficult," while "[u]nder symmetric conditions, the price to coordinate on seems to be naturally the monopoly price").

In sum, the Commission should find that Qwest retains significant market power in the duopoly situation in which it faces only one competitor providing fully substitutable services at comparable prices.

B. Qwest Retains Market Power in the Enterprise Telephone Exchange Services Market

Qwest retains a monopoly grip over large segments of the market for enterprise telephone exchange services. Cox Cable provides some competition for some set of services, but Qwest provides no information in its Petition that allows the extent of that competition to be assessed. Other wireline carriers may provide competition for geographic portions of the market, but in its Petition Qwest does not attempt to describe the extent to which it faces wireline facilities-based competition. If Qwest were deregulated in the provision of services in this market (and in the provision of wholesale services that allow competitors to compete in this market), it would have significant market power and could act on its incentive to increase rates and eliminate much of the competition that exists in this marketplace.

C. Qwest Provides No Data Concerning the Market for Access Services

In its Petition, Qwest seeks relief from dominant carrier regulation including, apparently, the Commission's dominant carrier regulation of Qwest's special and switched access services. Yet, Qwest's Petition is virtually silent regarding access services – it provides absolutely no data concerning market shares, market participants, supply elasticity, or other key factors relevant to a market power analysis for switched and special access services. For that reason alone, the Commission must deny Qwest's Petition to be freed of dominant carrier regulation for those services.

Furthermore, the inadequacies that mar Qwest's Petition as a result of its refusal to address specific markets and the problems they create are especially glaring in the case of the market for switched access services. As the Commission explained most recently in its order concerning CLEC access charges,[30] the nature of the market for switched access services – and terminating access services in particular -- poses unique problems. Even if Qwest were correct that there were multiple robust facilities-based competitors in Omaha providing local exchange services (and Qwest notably fails to show that is the case) that still would do nothing to create competition in the market for switched access in Omaha. The Commission has "acknowledge[d] that the market for access services does not appear to be *structured* in a manner that allows competition to discipline rates."[31] The Commission agreed that it was appropriate to characterize "both the terminating and originating access markets as consisting of a series of bottleneck monopolies over access to each individual end user."[32] In light of the Commission's conclusion that the switched access market as presently structured cannot constrain even *CLEC* rates, it is plain that the Commission must retain price cap regulation of Qwest's switched access rates

IV. SECTION 10(d) INDEPENDENTLY BARS THE FORBEARANCE SOUGHT

Section 10(d) of the Act states in relevant part that:

> the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.[33]

According to Qwest, by granting interLATA authority throughout its region, the Commission has already determined that Qwest has fully implemented the requirements of

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[30] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, 32 F.C.C.R. 533, ¶ 14, 17 (2004).

[31] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923, ¶ 33 (2001) (*CLEC Access Reform Order).*

[32] *Id.*, at ¶ 30.

[33] 47 U.S.C. § 160(d).

sections 251, 252, and 271[34] As support for that claim, Qwest relies on a provision of section 271 that requires the Commission to find that a Bell Operating Company ("BOC") "has fully implemented *the competitive checklist* in [section 271(c)(2)(B)]" in order to grant an application for in-region interLATA authority in a particular state.[35] Qwest's argument confuses the showing required to gain in-region interLATA authority with the showing required to satisfy section 10(d).

Contrary to Qwest's claims, the statute does not permit the FCC to forbear from enforcing the requirements of sections 251(c) and 271 as soon as a BOC has received interLATA authority. Rather, Congress prohibited the Commission from forbearing from any section 251(c) or 271 requirement until the BOC has fully implemented *all* of the requirements of section 251(c), not just those requirements included in the competitive checklist.[36] Indeed, certain critical requirements of section 251(c) are not included in the competitive checklist.[37] Among other duties, section 251(c) includes the ongoing requirements that incumbent LECs negotiate in

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[34] Petition at 30-31.

[35] 47 U.S.C. § 271(d)(3)(A)(i)) (emphasis added).

[36] Of course, the fact that both sections 10(d) and 271(d)(3) use the phrase "fully implemented" does not mean that Congress intended for that phrase to have the same meaning in both provisions. *See, e.g., Martini v. Federal National Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) ("[o]n numerous occasions, both the Supreme Court and this court have determined, after examining statutory structure, context and legislative history, that identical words within a single act have different meanings"); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (same).

[37] The competitive checklist incorporates only sections 251(c)(2)-(4). 47 U.S.C. § 271(c)(2)(B); *Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶ 64 (2000) ("*Texas 271 Order*") (implicitly incorporating subsection 251(c)(6)).

good faith and that they provide reasonable public notice of changes necessary for routing of services.[38]

As MCI previously has shown,[39] the most reasonable construction of the "fully implemented" requirement in section 10(d) is that it is satisfied "when markets are deemed competitive."[40] Specifically, the Commission should not consider section 10(d) satisfied until it can conclude that in a relevant geographic area, a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market without the need for continued enforcement of sections 251(c) or 271. Stated differently, the "fully implemented" standard requires a showing that a BOC no longer is dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the BOC.[41]

The fact that section 10(d) applies to both section 251(c) and section 271 reinforces this reading of "fully implemented." Both provisions focus on opening local telecommunications markets to entry through interconnection with an incumbent LEC, lease of unbundled network elements, or resale of retail services, or some combination thereof. In view of the paramount

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[38] *See* 47 U.S.C. § 251(c)(1), (c)(5). Similarly, full implementation of the 271 checklist, which is only one component of the requirements of section 271, is insufficient to support a finding that section 271 as a whole has been fully implemented for purposes of section 10(d).

[39] *See* Opposition of MCI, WC Docket No. 03-157, at 27-28 (Aug. 18, 2003).

[40] 141 Cong. Rec. S. 7942, 7956 (June 8, 1995) (statement of Senator McCain) (quoting from Heritage Foundation letter). Congress recognized that even after a BOC had satisfied the 271 checklist requirements and obtained in-region authority, it would continue to be dominant in local telecommunications markets. Accordingly, even with respect to those requirements on the checklist, full implementation of section 271 for purposes of section 10(d) requires more than a determination that the checklist has been satisfied. *See* 47 U.S.C. § 271(d)(6); *Texas 271 Order*, ¶ 434 ("The statutory regime makes clear that [the BOC] must continue to satisfy the 'conditions required for . . . approval' after it begins competing for long distance business").

[41] *See, e.g.,* Z-Tel Reply Comments, CC Docket No. 01-338, at 118-23 (July 17, 2002) (citing *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995)).

importance that Congress assigned to fostering the development of competitive local markets, the most reasonable reading of section 10(d) is to require the Commission to find that a robust wholesale market for facilities and services exists in a relevant geographic area so that it is assured that forbearing from enforcing the requirements of section 251(c) or section 271 will not lead promptly to the remonopolization of local and long distance services. And section 10(d) at a minimum requires Qwest to state with specificity the steps it has taken to fully implement each of the requirements from which it seeks forbearance.

Section 10(d) precludes the Commission from forbearing from applying the requirements of section 251(c) until those requirements have been "fully implemented."[42] Because Qwest has failed to demonstrate that the requirements of sections 251(c)(3), (4), and (6) have been fully implemented in its nine-state territory, its Petition must be denied.

V. CONCLUSION

For the foregoing reasons, MCI urges the Commission to deny the relief requested by Qwest in its Petition.

Respectfully submitted,

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[42] 47 U.S.C. § 160(d).

Certificate of Service

I, Lonzena Rogers, do hereby certify, that on this twenty-fourth day of August, 2004, I have caused a true and correct copy of MCI, Inc., Opposition in the matter of WC Docket No. 04-223 to be served by first class United States Postal Service, hand delivery and/or facsimile on the following:

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